

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
INTEL CORPORATION,)
)
Respondent.)
_____)

Docket No. 9341

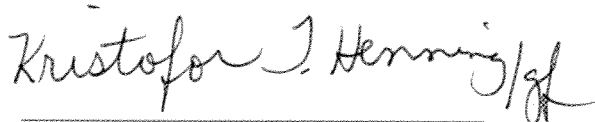
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**NON-PARTY HEWLETT-PACKARD COMPANY'S MOTION TO QUASH
SUBPOENA DUCES TECUM SERVED BY INTEL CORPORATION**

Pursuant to Federal Trade Commission Rule of Practice 3.34(c), 16 C.F.R. § 3.34(c), non-party Hewlett-Packard Company ("HP") moves to quash the subpoena *duces tecum* served on it by Intel Corporation. The grounds for HP's motion are set forth in the accompanying Memorandum of Law.

Dated: May 10, 2010

Respectfully submitted,



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**MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY HEWLETT-PACKARD
COMPANY’S MOTION TO QUASH SUBPOENA *DUCES TECUM*
SERVED BY INTEL CORPORATION**

I. INTRODUCTION

The Federal Trade Commission (“FTC”) brought this administrative adjudicative proceeding against Intel Corporation (“Intel”) for alleged violations of § 5 of the Federal Trade Commission Act. The FTC alleges that Intel holds improper monopoly power in the markets for central processing units (“CPUs”), microprocessors specifically, and graphics processing units (“GPUs”). Intel has served several document subpoenas on third-parties, including one on Hewlett-Packard Co. (“HP”) that includes fifty-eight (58) separate requests for documents that, in some instances, seek documents regarding subjects about which HP already produced over 200,000 pages of documents and nine (9) deposition witnesses in private anti-trust litigation against Intel. Because Intel’s subpoena is unduly burdensome, it should be quashed and Intel ordered to serve a new subpoena that is not unduly burdensome and instead narrowly tailored to seek only information/documents necessary to its defenses. If the Intel Subpoena is not quashed in its entirety, Intel should be required to reimburse HP for all of its costs and expenses incurred in responding to its subpoena.

HP had been engaged in discussions with Intel in an attempt to reach an agreement narrowing the scope of its subpoena. On Thursday, April 29, 2010, however, Intel informed HP that it would not agree (as it had in the past) to extend HP's deadline to move to quash its subpoena while those discussions continued. Intel changed its stance the following Monday. Nonetheless, despite further discussions, the parties could not reach an agreement that obviated the need for HP's present motion.

II. BACKGROUND

A. HP's Discovery In Intel's Private Anti-Trust Litigation

Advanced Micro Devices, Inc. ("AMD") brought an anti-trust action against Intel (now settled) that alleged Intel willfully maintained an improper monopoly in the microprocessor market in violation of § 2 of the Sherman Act. Class action plaintiffs also brought a similar action against Intel. AMD, Intel and the class plaintiffs all served third-party discovery requests on non-party HP that generally sought documents and information relating to microprocessor competition and pricing. In response, HP produced over 230,000 pages of documents (approximately 23,544 documents) and nine (9) deposition witnesses who were subject to questioning by Intel, among others.¹ AMD naturally also produced a voluminous amount of documents and deposition testimony to Intel. The FTC received HP's document production and participated in most, if not all, of the HP depositions. HP agrees that its prior discovery can be treated as produced in this proceeding, subject to appropriate confidentiality protections.

B. Discovery Requests To HP In This Proceeding

1. FTC Subpoena

¹ HP produced documents from thirty-six (36) custodians – fifteen (15) of whom Intel identified.

Complaint Counsel served a document subpoena on HP (“FTC Subpoena”), attached as Ex. A, that includes sixteen (16) separate document requests. With four limited exceptions in specification numbers 3, 9, 10 and 11 in the FTC Subpoena, Complaint Counsel has confirmed for HP that it does not seek microprocessor related documents from HP, but instead is focused on GPU, bundling, benchmarking and standards related information.²

2. Intel Subpoena

HP accepted service of a document subpoena from Intel on March 19, 2010, attached as Ex. B (“Intel Subpoena”), that according to Intel was a reaction to the information sought in the FTC Subpoena. The Intel Subpoena includes fifty-eight (58) separate requests for documents to HP that go beyond the categories of documents requested in the FTC Subpoena. At least twenty (20) seek microprocessor related information – the subject of HP’s prior document production and depositions. *See, e.g.*, Ex. B at Requests 10, 11, 15 and 19. Still others seek documents Intel itself is better suited to have and information/documents it likely already received from HP or AMD in its prior litigation. *See id.* at Request 38 (seeking, *inter alia*, documents regarding Intel’s “plans for development”); Request 40 (seeking documents regarding Intel’s relationship with NVIDIA); Request 10 (seeking documents about agreements between HP and AMD).

3. HP’s Attempts To Facilitate A Resolution Of Its Subpoenas

HP proposed to Complaint Counsel and Intel that the parties agree to a single document collection and search protocol for HP to resolve both the FTC and Intel Subpoenas and all parties agreed to attempt to do so – with HP facilitating those discussions. Therefore, in late

² These four limited exceptions do not require that HP conduct additional custodian searches for microprocessor documents of the type produced by HP in the private antitrust litigation. In addition, specification number 9 is not a pure microprocessor request and is instead a combined request for CPU and GPU related information from January 1, 2007 through the present.

March/early April HP contacted Intel to solicit a proposal from Intel for narrowed categories of information it sought as well as potential custodians. Intel provided a proposal on April 19, 2010, attached as Ex. C, that sought, *inter alia*, microprocessor related documents, including from senior HP executives and custodians whose documents it already received in its private anti-trust litigation. On April 26, 2010, HP contacted Intel and communicated its belief that, given HP's prior document productions and depositions, the additional microprocessor related discovery Intel sought was neither appropriate nor necessary. On April 29, 2010 and May 6, 2010, Intel informed HP that it would continue to seek the microprocessor related discovery generally as outlined in its April 19, 2010 proposal, notwithstanding HP's prior discovery production (albeit by deferring a handful of the proposed custodians identified in its April 19, 2010 proposal).³ Therefore, HP was forced to file this motion.

III. ARGUMENT

“There are three tests for every subpoena duces tecum: is it definite, is it relevant, and is it reasonable.” Fed. Trade Comm'n, Operating Manual (hereinafter “*F.T.C. Manual*”) § 10.13.6.6.4.7.3, available at <http://www.ftc.gov/foia/adminstaffmanuals.shtm> (last accessed April 29, 2010). A subpoena is “reasonable” if it is not unduly burdensome. *Id.* Where a document subpoena is not “reasonable” – *i.e.*, is unduly burdensome – it should be quashed. The FTC Practice Rules specifically authorize the Administrative Law Judge to limit discovery upon a determination that, *inter alia*, it is “unreasonably cumulative or duplicative,” is obtainable from a more convenient source or the “burden and expense of the proposed discovery outweigh its

³ On April 29, 2010, Intel informed HP that it intended to serve deposition subpoenas for current and former HP employees. The next day, April 30, 2010, Intel sent HP deposition subpoenas for three (3) current and five (5) former employees. Five (5) of the eight (8) have already been deposed in Intel's private antitrust litigation. HP's current deadline to move to quash those subpoenas for which it accepted service is May 13, 2010.

likely benefit.” 16 C.F.R. § 3.31(c)(1) (2008) (emphasis added); *see also* 16 C.F.R. § 3.31(d)(1) (2008)(authorizing Administrative Law Judge to issue order protecting non-party from undue burdensome discovery). The Intel Subpoena and its fifty-eight (58) requests are undue burdensome for HP because, among other reasons, it seeks document regarding subjects about which HP already produced hundreds of thousands of pages of documents and it otherwise seeks documents it is better suited to have or obtain from a more convenient source.

A. The Intel Subpoena Is Unduly Burdensome For HP

Simply put, there is no reasonable justification for Intel’s attempt to burden HP with discovery requests for subjects about which HP already produced more than 230,000 pages of documents and nine (9) deposition witnesses. Intel already sought and received documents from HP that it believed were necessary to defend against allegations of anti-trust violations with respect to the microprocessor market. Those are, of course, the nature of many of the FTC’s allegations in the instant proceeding. Having already received discovery from HP on that very subject, no additional discovery from HP is appropriate. That is particularly true given HP’s status as a non-party to this proceeding. *See, e.g., Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) (“[T]he fact of nonparty status may be considered by the court in weighing the burdens imposed in the circumstances.”); *Echostar Comm. Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (non-party status is “a factor which weighs against disclosure”) (citing *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993)).

Intel has previously informed HP that the Intel Subpoena was a reaction to the FTC Subpoena. As HP explained above, however, Complaint Counsel does not seek additional microprocessor related documents from HP (with four limited exceptions) beyond those it

already received. And, Intel will naturally receive any documents Complaint Counsel receives. Therefore, Intel is not prejudiced by relying on the HP documents it previously sought and received in its private anti-trust litigation. *Cf. F.T.C. Manual* § 10.13.6.4.7.3 (“[A]s the documents sought become less clearly necessary, the ALJ, the Commission, or the courts will be likely to cut the subpoena back to reasonable limits.”).

Intel’s duplicative microprocessor related document requests are not the only flaws in the Intel Subpoena. As explained above, the Intel Subpoena also seeks documents Intel itself is better suited to have and documents regarding topics that were the subject of AMD document productions in its prior litigation. There is no reason for Intel to burden HP with requests for that information.⁴

B. If Not Quashed, Intel Should Be Required To Reimburse HP For All Of Its Costs And Expenses Incurred In Responding To Its Subpoena.

The FTC Operating Manual expressly authorizes an Order under appropriate circumstances requiring a party seeking discovery to reimburse the subject of its discovery requests for its associated costs and expenses. *F.T.C. Manual* § 10.13.6.4.7.8. HP believes the proper course is to quash the Intel Subpoena and require Intel to serve a new subpoena that is not unduly burdensome to HP and is instead narrowly tailored to seek only documents that are necessary to Intel’s defenses. If the Intel Subpoena is not quashed in its entirety, Intel should be required to reimburse HP for all of its costs and expenses incurred in responding to the Intel Subpoena. Intel previously agreed to reimburse HP for a portion of its costs incurred in its private anti-trust litigation and, therefore, such a condition in this proceeding would be equally

⁴ HP’s prior document production did not include a material amount of GPU related documents. HP will produce GPU related documents in response to the FTC subpoena, and Intel will, of course, receive those documents.

appropriate. That is particularly true given HP's prior discovery efforts and the exceptional breadth of the Intel Subpoena.⁵

IV. CONCLUSION

The Intel Subpoena should be quashed and Intel required to serve another subpoena that is not unduly burdensome to HP and is narrowly tailored to seek only documents necessary to Intel's defenses. If the Intel Subpoena is not quashed in its entirety, Intel should be required to reimburse HP for all costs and expenses incurred in responding to its Subpoena.

Dated: May 10, 2010

Respectfully submitted,



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Counsel for Hewlett-Packard Company

⁵ HP has also prepared formal responses and objections to the Intel Subpoena, attached hereto as Ex. D, to preserve its rights in the event any portion of the Intel Subpoena is not quashed.

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**STATEMENT OF KRISTOFOR T. HENNING PURSUANT TO FEDERAL TRADE
COMMISSION RULE OF PRACTICE 3.22(G)**

I am an attorney with Morgan, Lewis & Bockius LLP and submit this statement pursuant to Federal Trade Commission Rule of Practice 3.22(g), 16 CFR § 3.22(g), in connection with Non-Party Hewlett-Packard Company’s Motion to Quash Subpoena *Duces Tecum* Served by Intel Corporation. I spoke with David Emanuelson, counsel for Intel Corporation, in good faith in an attempt to resolve by agreement the issues raised by HP’s Motion to Quash on at least March 30, 2010, April 19, 2010, April 26, 2010, April 29, 2010, April 30, 2010, May 5, 2010, May 6, 2010, May 7, 2010 and May 10, 2010. During those conversations, the parties were unable to reach an agreement that obviated the need for HP’s motion.

Dated: May 10, 2010

Respectfully submitted,



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**[PROPOSED] ORDER GRANTING MOTION OF NON-PARTY HEWLETT-PACKARD
COMPANY TO QUASH SUBPOENA *DUCES TECUM* SERVED BY INTEL
CORPORATION**

Before the Administrative Law Judge is Non-Party Hewlett-Packard Company's Motion to Quash Subpoena *Duces Tecum* Served By Intel Corporation ("Motion to Quash"). Having considered the Motion to Quash and the supporting arguments and the responses by Intel Corporation, this Court finds that the motion should be, and hereby is, GRANTED.

IT IS THEREFORE ORDERED that the Subpoena *Duces Tecum* issued to Hewlett-Packard Corporation on March 19, 2010 by Intel Corporation, is hereby quashed in its entirety.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: May ____, 2010